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February 17, 2015

Margaret Herring, Civil Investigator
U.S. Environmental Protection Agency, Region 5
Superfund Division
Enforcement and Compliance Assurance Branch (SE-5J0
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Re: South Dayton Dump and Landfill, Moraine, Ohio -
Responses of DAP Products Inc. to Request for Information

Dear Ms. Herring:

The purpose of this letter is to respond on behalf of DAP Products Inc. to the above-referenced Request for Information from U.S. EPA, dated January 16, 2015 (the "Requests").

Objections

All of DAP Products Inc.'s responses are subject to its objections that the Requests are overly broad, unduly burdensome, vague, ambiguous and oppressive, ask for irrelevant information, and exceed U.S. EPA's authority under CERCLA § 104(e). Without limiting the foregoing, the questions seek extensive information that is of little or no relevance to the areas of inquiry authorized under CERCLA § 104(e) and/or is otherwise unrelated to the need for any response action at the South Dayton Dump and Landfill ("SDD") Site or whether DAP Products Inc. may have arranged to dispose of hazardous substances to the SDD Site. Moreover, much of the information sought, regardless of whether it is within the scope of what may be sought under CERCLA § 104(e), is already in U.S. EPA's files or readily available to it. Without limiting the foregoing:

(a) DAP Products Inc. objects to Instruction No. 6, which directs DAP Products Inc. to supplement its responses, and Instruction No. 10, which requires DAP Products Inc. to certify its responses, as beyond the scope of § 104(e).

(b) DAP Products Inc. objects to Instruction No. 8 to the extent that it states that responses must include information and documents in the possession or control of DAP Products Inc.'s agents, contractors or former employees.

(c) DAP Products Inc. objects to Instruction Nos. 9 and 11 to the extent that that they seek information protected by the attorney-client privilege, the attorney work product doctrine or any other privilege or rule that protects information from disclosure.

(d) DAP Products Inc. objects that the questions regarding "waste" and "materials" are vague, ambiguous and overbroad, in that such terms are not defined and could be interpreted to encompass substances that are not regulated under CERCLA.

(e) DAP Products Inc. objects to Definition No. 4 ("facility" or "facilities") as vague, ambiguous and subject to multiple interpretations.

DAP Products Inc. also references the enclosed summary judgment ruling issued by the United States District Court for the Southern District of Ohio in *Hobart Corp. v. The Dayton Power & Light Co.*, which held that, based on the evidence adduced (including the Edward Grillot depositions), DAP Products Inc. cannot be held liable as an "arranger" in connection with the SDD Site.

There is simply no evidence--either in the deposition testimony in the *Hobart* litigation or in any available documentation--to demonstrate that DAP Products Inc. arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances at the SDD Site, nor does DAP Products Inc. have any information to indicate that it had any dealings with the SDD Site, Cyril Grillot, Kenneth Grillot, Alcine Grillot, or Horace Boesch, Sr. and thus, DAP Products Inc. should not be considered a potentially responsible party with respect to the SDD Site.

Notwithstanding its objections, DAP Products Inc. has conducted an investigation of reasonably available information. Where questions in the Requests are vague, ambiguous, overbroad or beyond the scope of U.S. EPA's authority under CERCLA § 104(e), DAP Products Inc. has made appropriate and reasonable efforts to provide responsive information regarding its "facilities," which DAP Products Inc. construes as seeking information related to operations located in the vicinity of the SDD Site. In providing the responses below, DAP Products Inc. does not admit any liability for any release or threat of release of any hazardous substances at, near or from the SDD Site. DAP Products Inc. reserves the right to assert any applicable objections to the scope and reasonableness of U.S. EPA's requests and any applicable privileges, as well as to raise any and all defenses to allegations of liability under CERCLA in the future. All of DAP Products Inc.'s objections apply to each of the following responses and are incorporated by reference as though fully set forth in each of them.

Responses to Questions

1. Identify all persons consulted in the preparation of the answers to these questions.

   Response - Neema Toolaabee, DAP Products Inc.'s Manager, Regulatory & Environmental Affairs and Ken Barr, Plant Manager, Tipp City. Mr. Toolaabee and Mr. Barr may be contacted through the Calfee, Halter & Griswold LLP, via the undersigned.

2. Identify all documents consulted, examined or referred to in the preparation of the answers to these questions, and provide copies of all such documents.

   Response - DAP Products Inc. conducted a search of its files for responsive information which did not reveal anything to indicate that it has had dealings with, or any other connection to, the SDD Site.

3. If you have reason to believe that there may be persons able to provide a more detailed or complete response to any question or who may be able to provide additional responsive documents, identify such persons. Provide their current, or last known, address, telephone numbers, and e-mail address.

   Response - None.

4. Provide names, addresses, telephone numbers, and e-mail addresses of any individuals, including former and current employees, who may be knowledgeable about Respondent's operations and hazardous substances handling, storage and disposal practices.

   Response - Neema Toolaabee.

5. State the date(s) on which the Respondent sent, brought or moved drums and/or hazardous substances to the South Dayton Dump and Landfill (SDDL) Site and the names, addresses, telephone numbers, and e-mail addresses of the person(s) making arrangements for the drums and/or hazardous substances to be sent, brought or moved to the SDDL Site.

   Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 5. Without limiting the foregoing and without waiving any objections, DAP Products Inc. responds that it has no information to indicate that it sent, brought or moved drums and/or hazardous substances to the SDD Site.

6. Did Respondent haul or send materials to the SDDL Site in vehicles it owned, leased or operated? If yes, during what time periods did this occur? If no, how did Respondent

transport materials to SDDL? Identify the hauler(s) and provide the addresses, telephone numbers, and e-mail addresses of these entities.

Response - See response to question no. 5.

7. List all federal, state and local permits and/or registrations and their respective permit numbers issued to Respondent for the transport and/or disposal of materials.

   Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 7.

8. Which shipments or arrangements were sent under each permit? If what happened to the hazardous substances differed from what was specified in the permit, please state, to the best of your knowledge, the basis or reasons for such difference.

   Response - See response to question no. 7.

9. Were all hazardous substances transported by licensed carriers to hazardous waste Treatment Storage and Disposal Facilities permitted by the U.S. EPA?

   Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 9.

10. List all federal, state and local permits and/or registrations and their respective permit numbers issued for the transport and/or disposal of wastes.

    Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 10.

11. Does your company or business have a permit or permits issued under Resource Conservation and Recovery Act? Does it have or has it ever had, a permit or permits under the hazardous substance laws of the State of Ohio? Does your company or business have an EPA Identification Number, or an identification number supplied by the State Environmental Protection Agency? Supply any such identification number(s) your company or business has.

    Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 11.

12. Identify whether Respondent ever filed a Notification of Hazardous Waste Activity with the EPA or the corresponding agency or official of the State of Ohio, the date of such filing, the wastes described in such notice, the quantity thereof described in such notice, and the identification number assigned to such facility by EPA or the state agency or official.

Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 12.

13. Identify all individuals who currently have and those who have had responsibility for Respondent's environmental matters (e.g. responsibility for the disposal, treatment, storage, recycling, or sale of Respondent's wastes). Also provide each individual's job title, duties, dates performing those duties, supervisors for those duties, current position or the date of the individual's resignation, and the nature of the information possessed by such individuals concerning Respondent's waste management. For each individual identified in response to this question provide the current or most recent known address, telephone number and email address.

    Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 13.

14. Describe the containers used to take any type of waste from Respondent's operation, including but not limited to:

    a. the type of container (e.g. 55 gal. drum, dumpster, etc.);

    b. the colors of the containers;

    c. any distinctive stripes or other markings on those containers;

    d. any labels or writing on those containers (including the content of those labels);

    e. whether those containers were new or used; and

    f. if those containers were used, a description of the prior use of the containers.

    Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive question nos. 14a-14f.

15. For any type of waste describe Respondent's contracts, agreements, or other arrangements for its disposal, treatment, or recycling. Provide copies of all documents relating to the transportation or disposal of said waste, including correspondence and manifests. Include all correspondence and records of communication between Respondent and Cyril Grillot, Kenneth Grillot, Alcine Grillot, or Horace Boesch, Sr.

    Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 15. Without limiting the foregoing and without waiving any objections, DAP Products Inc. responds that it did not enter into any

contracts or agreements or make other arrangements for disposal, treatment, or recycling of waste at the SDD Site.

16. Provide copies of such contracts and other documents reflecting such agreements or arrangements.

g (*sic*). State where Respondent sent each type of its waste for disposal, treatment, or recycling.

h. Identify all entities and individuals who picked up waste from Respondent or who otherwise transported the waste away from Respondent's operations (these companies and individuals shall be called "Waste Carriers" for purposes of this Information Request).

i. If Respondent transported any of its wastes away from its operations, please so indicate and answer all questions related to "Waste Carriers" with reference to Respondent's actions.

j. For each type of waste specify which Waste Carrier picked it up.

k. For each type of waste, state how frequently each Waste Carrier picked up such waste.

l. For each type of waste state the volume picked up by each Waste Carrier (per week, month, or year).

m. For each type of waste state the dates (beginning & ending) such waste was picked up by each Waste Carrier.

n. Provide copies of all documents containing information responsive to the previous seven questions.

o. Describe the vehicles used by each Waste Carrier to haul away each type of waste including but not limited to:

i. the type of vehicle (e.g., flatbed truck, tanker truck, containerized dumpster truck, etc.);

ii. names or markings on the vehicles; and

iii. the color of such vehicles.

j. Identify all of each Waste Carrier's employees who collected Respondent's wastes.

k. Indicate the ultimate disposal/recycling/treatment location for each type of waste.

l. Provide all documents indicating the ultimate disposal/recycling/treatment location for each type of waste.

m. Describe how Respondent managed pickups of each waste, including but not limited to:

   i. the method for inventorying each type of waste;

   ii. the method for requesting each type of waste to be picked up;

   iii. the identity of (see Definitions) the waste carrier employee/agent contacted for pickup of each type of waste;

   iv. the amount paid or the rate paid for the pickup of each type of waste;

   v. the identity of (see Definitions) Respondent's employee who paid the bills; and

   vi. the identity of (see Definitions) the individual (name or title) and company to whom Respondent sent the payment for pickup of each type of waste.

n. Identify the individual or organization (i.e., the Respondent, the Waste Carrier, or, if neither, identify such other person) who selected the location where each of the Respondent's wastes were taken.

o. State the basis for and provide any documents supporting the answer to the previous question.

p. Describe all wastes disposed by Respondent into Respondent's drains including but not limited to:

   i. the nature and chemical composition of each type of waste;

   ii. the dates on which those wastes were disposed;

   iii. the approximate quantity of those wastes disposed by month and year;

iv. the location to which these wastes drained (e.g. on-site septic system, onsite storage tank, pre- treatment plant, Publicly Owned Treatment Works (POTW), etc.); and

v. whether and what pretreatment was provided.

q. Identify any sewage authority or treatment works to which Respondent's waste was sent.

r. If not already provided, specify the dates and circumstances when Respondent's waste was taken to the SDDL Site, and identify the companies or individuals who brought Respondent's waste to the SDDL Site. Provide all documents which support or memorialize your response.

Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question nos. 16g-16r. Without limiting the foregoing and without waiving any objections, DAP Products Inc. responds that it has no information to indicate that it contracted or otherwise arranged for disposal, treatment or recycling of waste at, or transportation of waste to, the SDD Site.

17. Provide all Resource Conservation and Recovery Act (RCRA) Identification Numbers issued to Respondent by EPA or a state for Respondent's operations.

Response - See response to question no. 11.

18. Identify (see Definitions) all federal offices to which Respondent has sent or filed information about hazardous substance or hazardous waste.

Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 18.

19. State the years during which such information was sent/filed.

Response - See response to question no. 18.

20. Identify (see Definitions) all state offices to which Respondent has sent or filed hazardous substance or hazardous waste information.

Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 20.

21. State the years during which such information was sent/filed.

Response - See response to question no. 20.

22. List all federal and state environmental laws and regulations under which Respondent has reported to federal or state governments, including but not limited to: Toxic Substances Control Act, 15 U.S.C. Sections 2601 et seq., (TSCA); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. Sections 1101 et seq., (EPCRA); and the Clean Water Act (the Water Pollution Prevention and Control Act), 33 U.S.C. Sections 1251 et seq.; Solid Waste and Infectious Waste Regulations, OAC 3745-27 (former rule EP-20); Licenses for Solid Waste, Infectious Waste Treatment, or Construction and Demolition Debris Facilities, OAC 3745-37 (former rule EP-33); Solid and Hazardous Wastes, ORC 3734-01 through 3734-11; Open Burning Standards, OAC 3745-19-03.

Response - DAP Products Inc. does not have and has not had any "facilities" and, thus, has no information responsive to question no. 22.

Conclusion

Given the lack of information to indicate that it arranged for disposal of hazardous substances at the SDD Site, DAP Products Inc. submits that it should have no liability under CERCLA related to the SDD Site and requests that U.S. EPA remove it from the list of potentially responsible parties with respect to the SDD Site.

Very truly yours,

William E. Coughlin

Enclosure

cc (w/o encl. - via e-mail):
Swata Gandhi, Esq.
Ronald M. McMillan, Esq.
Susan R. Strom, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HOBART CORP., *et al.*,

Plaintiffs,

v.

THE DAYTON POWER & LIGHT CO., *et al.*,

Defendants.

Case No. 3:13-cv-115

JUDGE WALTER H. RICE

DECISION AND ENTRY OVERRULING DEFENDANT DAP PRODUCTS INC'S MOTION FOR SUMMARY JUDGMENT (DOC. #266) WITHOUT PREJUDICE TO REFILING ONCE PLAINTIFFS HAVE COMPLETED DISCOVERY

In connection with clean-up efforts at the South Dayton Dump and Landfill Site (the "Site"), Plaintiffs Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation filed suit against DAP Products, Inc. ("DAP"), and more than thirty other defendants, all "potentially responsible parties" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§9607 and 9613 ("CERCLA"). Plaintiffs asserted claims of cost recovery under § 107(a) of CERCLA, contribution under § 113(f)(3)(B) of CERCLA, declaratory judgment, and unjust enrichment.

This matter is currently before the Court on DAP's Motion for Summary Judgment. Doc. #266. For the reasons set forth below, the Court overrules that

motion, without prejudice to re-filing once Plaintiffs have had the opportunity to complete discovery.

I. Background and Procedural History

The South Dayton Dump and Landfill Site ("the Site") is contaminated with numerous hazardous substances. Waste was deposited at the Site from the early 1940s until 1996. Plaintiffs were identified as potentially responsible parties ("PRPs") under CERCLA because they either generated the hazardous substances found at the Site, owned or operated the Site when hazardous substances were disposed of there, or arranged for disposal or transport for disposal of hazardous substances at the Site. *See generally* 42 U.S.C. §§ 9604, 9607, and 9622.

In August of 2006, Plaintiffs entered into an "Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study" ("2006 ASAOC") with the United States Environmental Protection Agency ("EPA"). In May of 2010, Plaintiffs sued several other PRPs, seeking cost recovery under § 107(a) of CERCLA, contribution under § 113(f)(3)(B) of CERCLA, damages for unjust enrichment, and declaratory judgment. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, Case No. 3:10-cv-195 ("*Hobart I*"). In June of 2012, Plaintiffs sued several additional PRPs, including DAP, asserting the same causes of action. *Hobart Corp. v. Coca-Cola Enters., Inc.*, Case No. 3:12-cv-213 ("*Hobart II*"). The Court eventually dismissed *Hobart I* and *Hobart II*, having determined that Plaintiffs were limited to a § 113(f)(3)(B) contribution action, which was barred by the three-

year statute of limitations. That decision was recently affirmed by the Sixth Circuit Court of Appeals. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014).

On April 5, 2013, Plaintiffs entered into an "Administrative Settlement Agreement and Order on Consent for Removal Action" ("2013 ASAOC") with the EPA, in connection with certain "vapor intrusion risks" at the Site. Plaintiffs then filed the above-captioned case ("*Hobart III*"), naming over thirty PRPs as defendants, including DAP once again. Although Plaintiffs assert the same four causes of action asserted in *Hobart I* and *Hobart II*, the claims at issue here arise out of the 2013 ASAOC rather than the 2006 ASAOC.

The Corrected Third Amended Complaint in *Hobart III* alleges that:

> Defendant DAP Products Inc. is the legal successor in interest under the theories of de facto merger and/or mere continuation and/or assumption of liabilities to DAP, Inc. ("DAP"). DAP Products Inc. was first incorporated in Delaware as Wassall USA Acquisition, Inc., on September 23, 1991. That same month, Wassall USA Acquisition, Inc. purchased the assets of DAP, and agreed to indemnify DAP for certain environmental liabilities, within which Plaintiffs' claims are included. Wassall USA Acquisition, Inc. changed its name to DAP Products Inc. on November 8, 1991. DAP Products Inc. has substantially continued DAP's business. DAP Products Inc. claims DAP's history as its own on its current website, and it derives financial benefit from the "DAP" name. DAP arranged for the disposal of wastes at the Site, including waste containing hazardous substances from its facilities and operation located in and around Dayton. DAP contributed to Contamination at the Site through its disposal of wastes that included hazardous substances at the Site.

Corrected Third Am. Compl. ¶71, Doc. #250, PageID##2498-99.

In February of 2014, the Court dismissed the cost recovery claims brought under §107(a) of CERCLA, and a portion of the other claims. Doc. #189. DAP has now moved for summary judgment on the remainder of the claims, arguing that Plaintiffs have no evidence from which a reasonable jury could find that any DAP entity arranged for the disposal of hazardous substances at the Site. DAP further argues that, without such evidence, each remaining claim fails.

Plaintiffs maintain that the evidence presented to date is sufficient to withstand summary judgment. In the alternative, pursuant to Federal Rule of Civil Procedure 56(d), they request that the Court defer ruling on the motion, allowing them time to conduct discovery so that they can adequately respond to the motion.

II. Summary Judgment Standard

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323; *see also Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991).

"Once the moving party has met its initial burden, the nonmoving party must

present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1245 (6th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rule 56 "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324. "The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff." *Michigan Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir. 1994).

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In determining whether a genuine dispute of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *Id.* at 255. If the parties present conflicting evidence, a court may not decide which evidence to believe. Credibility

determinations must be left to the fact-finder. 10A Wright, Miller & Kane, *Federal Practice and Procedure* Civil 3d § 2726 (1998).

In determining whether a genuine dispute of material fact exists, a court need only consider the materials cited by the parties. Fed. R. Civ. P. 56(c)(3). "A district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). If it so chooses, however, the court may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Analysis

In its motion for summary judgment, DAP argues that, despite engaging in years of discovery, Plaintiffs have failed to produce any evidence that DAP "arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances" to the South Dayton Dump and Landfill Site. *See* 42 U.S.C. § 9607(a)(3).

Edward Grillot, a former employee at the Site, testified in an April 24, 2012, deposition that he had observed tubes of caulking and silicone, and cans of window glazing, all with DAP's name on them, at the Site. Doc. #266-2, PageID##2751-52. He also testified that DAP was a customer at the Site, but he did not know exactly how the materials got there. He did not think that DAP had

its own truck, and speculated that DAP had used another hauler. *Id.*[1] In a subsequent deposition, taken on December 16 and 17, 2013, Grillot again testified that waste from DAP was brought to the Site beginning in the 1960s, but he could not remember if it came in DAP's own trucks or was hauled in by someone else. Doc. #266-3, PageID##2757-62.

DAP argues that Grillot's testimony, that he observed DAP products at the Site, is insufficient to create a genuine issue of material fact concerning whether DAP arranged to have those hazardous materials disposed of or transported there. According to DAP, since this is a critical element, summary judgment is therefore warranted on all claims. Plaintiffs contend that they have presented sufficient evidence from which a reasonable jury could find that DAP arranged for disposal or transportation of hazardous substances at the Site.

The Court finds that, at the present time, Plaintiffs have not presented sufficient evidence to withstand summary judgment. The mere fact that DAP products were transported to the Site does not necessarily mean that DAP arranged for that to happen. It is possible that some third party purchased the DAP products for their intended purpose, and later arranged for their disposal at the Site. DAP cannot be held liable as an "arranger" without a showing that it took "intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 611 (2009). At this stage of the

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[1] DAP notes that, because it did not participate in Grillot's April 24, 2012, deposition, this testimony could not be used against DAP at trial. Fed. R. Civ. P. 32(a)(1). DAP also objects to the leading nature of the questions asked of Grillot.

litigation, Plaintiffs have failed to present sufficient evidence that DAP engaged in any such affirmative act.

In the alternative, Plaintiffs argue that it is premature for the Court to consider DAP's motion for summary judgment because Plaintiffs have not yet had the opportunity to conduct all necessary discovery and cannot adequately respond. *See La Quinta Corp. v. Heartland Props., LLC*, 603 F.3d 327, 334 (6th Cir. 2010) ("[i]t is well established that the plaintiff must receive a full opportunity to conduct discovery to be able to successfully defeat a motion for summary judgment").

Federal Rule of Civil Procedure 56(d) states that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."

Plaintiffs' counsel, Larry Silver, has submitted a declaration stating that Plaintiffs need discovery to help identify "DAP's haulers and transporters to determine the extent of DAP's use of the Site for disposal and the composition of its waste." Plaintiffs have learned that DAP often used Industrial Waste Disposal Co. Inc. ("IWD") to haul its waste, and that IWD often transported waste to the Site. Silver Decl. ¶¶5-6, Doc. #270-2, PageID##2805-06. Plaintiffs would like further discovery from IWD and from Waste Management of Ohio, Inc. ("WMO"), IWD's successor-in-interest, to learn who disposed of DAP's waste, and who made the decision to dispose of DAP's waste at this particular Site. *Id.* at ¶8.

Silver further states that, because this information is within the control of DAP and its haulers, Plaintiffs have been unable to obtain it up to this point. *Id.* at ¶10.

In determining whether to grant a request under Rule 56(d), the court should consider: (1) when the movant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery could make a difference in the outcome of the pending motion; (3) how long the discovery period has lasted; (4) whether the movant has been dilatory in its discovery efforts; and (5) whether the opposing party was responsive to prior discovery requests. *See Audi AG v. D'Amato*, 469 F.3d 534, 541 (6th Cir. 2006) (citing *Plott v. Gen. Motors Corp.*, 71 F.3d 1190, 1196–97 (6th Cir. 1995)).

Here, Plaintiffs have known for several years that they would need proof that DAP arranged for disposal of hazardous substances at the Site, because this is a required element of each of their claims. Nevertheless, discovery in cases like this, involving conduct that took place decades ago by dozens of potentially responsible parties, is, by its very nature, protracted and difficult. Although litigation concerning this Site has been ongoing for quite some time, discovery was stayed in *Hobart II*, pending resolution of the dispositive motions. In the instant case, discovery began only a few months ago.

DAP does not argue that Plaintiffs have been dilatory in their discovery efforts. Rather, DAP maintains that additional discovery would be futile because, as DAP informed Plaintiffs in its Rule 26(a)(1) Initial Disclosures, DAP has "no site nexus documents." Doc. #271-5, PageID#2849. DAP argues that Silver's

statement, that Plaintiffs have learned that DAP was one of IWD's customers, is insufficient to justify additional time for discovery, given the fact that IWD apparently hauled waste to several different landfills.

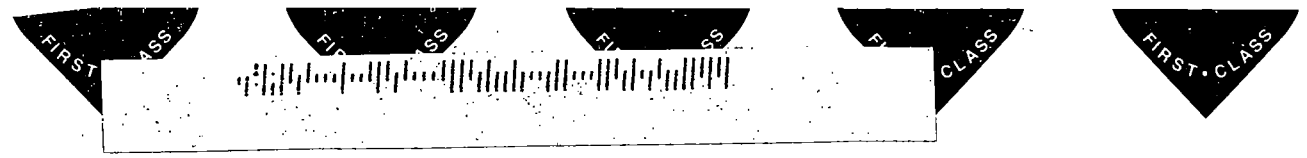
The Court disagrees. The fact that DAP does not have "site nexus documents" does not mean that IWD, WMO, or other waste haulers who may have contracted with DAP do not have them. Given that Plaintiffs already have information that DAP products were regularly brought to the Site, that DAP was one of IWD's customers, and that IWD often transported waste to the Site, Plaintiffs must be given a fair opportunity to conduct additional discovery to search for evidence of the missing link, *i.e.*, that DAP arranged for those hazardous substances to be transported to, or disposed of, at the Site. All agree that this information is crucial to the outcome of the pending motion.

IV. Conclusion

Having weighed the various factors under Federal Rule of Civil Procedure 56(d), the Court concludes that Plaintiffs are entitled to additional discovery before the Court decides whether DAP is entitled to summary judgment. The Court therefore OVERRULES Defendant DAP Products, Inc.'s Motion for Summary Judgment (Doc. #266), WITHOUT PREJUDICE to re-filing once Plaintiffs have had the opportunity to complete discovery.

Date: September 12, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE



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